Office Supreme Court U.S.
FILED
APR 10 1900
JAMES H. McKENNEY,
Clerk.

No. 251.

Brf. of Hallam for Appts.

Filed April 10, 1900.

Supreme Court of the United States

OCTOBER TERM, 1899.

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GEORGETTE A. CHAMBERLIN ET AL., Appellants,

vs.

HORATIO BROWNING ET AL., Appellees.

APPEAL FROM THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

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STATEMENT OF CASE.

On the 25th day of August, 1898, the appellants filed their bill in equity against the appellees and others, in the supreme court of the District of Columbia, setting forth that all the parties are residents of the District of Columbia, and that on the 24th day of April, 1896, John B. Scott, one of the defendants, executed a certain deed of assignment to Horatio Browning, one of the appellees; this deed is copied into the record (p. 12), and is made in conformity with "An act relative to voluntary assignments in the District of Columbia," approved February 24, 1893, 24

Stat. L., 474, and was signed and acknowledged by Browning as well as Scott on the day of its date. The schedules required by the act are annexed, with the statutory affidavit of the correctness and completeness of the assets and liabilities; and all the parties to this appeal are named in the list of creditors. The description in the granting clause is—

> "all and singular the *real estate*, goods, chattels, merchandise, effects, stocks, promissory notes, debts, claims, demands *and property* of him the said party of the first part (except all legal exemptions which are hereby reserved by said party of the first part), the same being fully described in Schedule 'A' hereto annexed."

One of the items in the schedule, the only one material to the present appeal, is—

> "estate for life of said party of the first part in twenty-five acres of land in Montgomery county, State of Maryland, particularly described in deed recorded in Liber J. A. No. 11, folio 241, *et seq.*, of the land records of said county."

This deed was from John D. Coughlan to Scott, conveying, as will be seen later on, not only a life estate but certain other powers and interests amounting practically to a fee simple.

The bill then goes on to show that all the appellees had actual as well as constructive notice of the deed of assignment, elected to accept its provisions, attended creditors' meetings called by the assignee, voted as to the disposition of the estate, and accepted dividends paid by the assignee from the proceeds; but afterwards, in violation of the rights of the appellants and other creditors, went to Montgomery county and levied attachments on the 25 acres of land as Scott's property,

procured *ex parte* judgments of condemnation, and had issued on the judgment of Keane, one of the appellees, a writ of *fieri facias*, and were about to sell the land thereunder. That in order to effectuate their attachment liens Keane had, in the interest of all the attaching creditors, by bill in equity in the Maryland court, had the title in Scott declared to be a fee simple. In addition to charging gross breach of trust by Browning, in attempting thus to use to his own advantage property he held in a fiduciary capacity, the bill alleged that he had never made any accounting, and prayed for him to render an account of such assets as he had administered, for his removal and the appointment of a new trustee, etc.; and that the appellees be restrained, pending the action, from in any manner proceeding to enforce their said attachments or judgments, and from doing any act or thing to hinder, delay or interfere with the control or management of the estate abroad for the equal benefit of all said Scott's creditors, and from in any way seeking to secure to themselves any greater benefit or interest out of said estate and effects than shall represent their *pro rata* share under said assignment; *or, in the alternative*, if this could not be done, that the attaching creditors be directed to bring into court any moneys realized from said land, and that the same be treated as assets passing by said deed of assignment, and distributed among the creditors as therein directed.

On the filing of this bill, a restraining order was at once granted as prayed; on the next day the appellee, Keane, filed his affidavit denying certain allegations of the bill, and a motion to discharge the restraining order as to him; which the court refused to do, but so far modified it as to direct that it should—

"not interfere with his (Keane's) right to allow the sale advertised under his writ of *fieri facias* to proceed."

The appellees filed separate demurrers to this bill claiming: 1. That the bill is multifarious; 2. Complainants show no interest; 3 Want of jurisdiction; 4. Complainants' laches.

On hearing of these demurrers they were overruled November 1, leave given to answer, and the temporary injunction, as modified by the order of Aug. 26, continued until final hearing.

It may be mentioned here that in addition to reliance on the statute of 1893, *supra*, as passing all property, whether described or not, the appellants alleged (record p. 5), that it was the intention of Scott, well known to Browning, to convey all his property, and the use of the term "estate for life," in reference to the Maryland land was an attempt to describe all his interest; and had he known the courts would hold the limitations in the Coughlan deed constructively fraudulent and that he really had a fee simple, he would have so listed it in his schedule; and also prayed that Scott be required, if need be, to execute to the new trustee a deed conveying the fee simple; also that the theory upon which appellees undertook to appropriate the land was that the deed was void, for failure of the assignee to give a bond required by a Maryland statute; a defect which the appellants insist cannot avail appellees, because they are estopped both by their residence and their acceptance of the deed.

A special appeal was granted the appellees from this decree of November 1, and on January 12, 1899, the court of appeals reversed same on two grounds stated in the opinion—1. That under the Maryland law no

title to this land passed because of the failure of the assignee to give bond as required by a Maryland statute hereinafter mentioned. 2. That the Maryland judgments of condemnation, were final and conclusive against all the world. The mandate directed the sustaining of the demurrer, dissolving of the injunction and dismissal of the bill as to all the present appellees; but allowed the case to proceed as to the matter of accounting, etc.

On January 31, in conformity with this mandate, the supreme court of the District entered a decree sustaining the demurrer, dissolving the injunction and dismissing the bill as to the present appellees, awarding costs and referring the cause to the auditor to ascertain the damages sustained by the injunction. An appeal was then taken by the present appellants, and on March 14 the decree of January 31, was affirmed by the court of appeals; and from this the present appeal is taken.

ASSIGNMENT OF ERRORS.

The appellants assign the following errors in the proceedings, as grounds for reversal—grouping them in order of time.

1. The order of August 26, 1898, modifying the restraining order. (p. 9.)

2. The decree of the court of appeals of January 12, 1899, reversing the decree of the lower court. (p. 32.)

3. The ruling by said court that the deed did not pass the title to the Maryland land. (p. 28.)

4. The ruling by said court that the judgment of condemnation was binding on the appellants. (pp. 28-29.)

5. The decree of the supreme court of the District; (*a*) sustaining demurrer; (*b*) dissolving injunction; (*c*) dismissing bill; (*d*) awarding costs; (*e*) directing auditor to ascertain damages.

6. The decree of the court of appeals, March 14, 1899, affirming said decree.

AS TO JURISDICTION OF THIS COURT.

Being informed that the question will be raised that this court is without jurisdiction because the amount in controversy does not exceed $5,000, I call the court's attention to the fact that the object is to save for the estate land worth $15,000. (p. 5.)

> "In a suit for property, plaintiff's averment of value determines the amount in controversy".
>
> Bennett *vs.* Butterworth, 8 How. 124.

That the appellants act in lieu of the appointed assignee, whose actions and interest conflict with theirs; that while the individual claim of each of the appellees is less than $5,000 it is alleged that they were acting jointly. (p. 6.)

Besides this it is evident that any proceeding to enjoin one attaching creditor would not operate to relieve the sale of the land under a judgment of any one or more of the others; hence this case must be treated as one to save from sequestration or alienation by sheriff's sale $15,000 worth of property. It may be added, also, that the claim of one of the appellants, Mrs. Chamberlin, is stated at over $25,000 (p. 5);

hence in any view of the case there is more than $5,000 involved and the jurisdiction of this court is clear.

> "The value of the specific property which is in litigation must determine the jurisdiction. The value of a trust estate which is involved is the value of the matter which is in dispute for the purpose of an appeal by the trustee."
>
> Kenaday *vs.* Edwards, 133 U. S. 178.

> "If the determination of a cause necessarily involve the validity of title to land of more than $5,000 in value, and several plaintiffs claim under it; although the claim of no one exceeds that sum, the amount is within the jurisdiction of the Supreme Court."
>
> New Orleans P. R. Co. *vs.* Parker, 143 U. S. 42.

> "When a bill by a preferred creditor for the amount more than $5,000 under an assignment to enjoin a sale of the property by attaching creditors and to establish the assignment with its preferences is dismissed, the distribution of the assigned property among these claiming under the assignment not being in question, an appeal may be had if the property involved in the assignment exceeds $5,000 in value, although the amount of the claims of the attaching creditors is less than that sum."
>
> Estes *vs.* Gunter, 121 U. S. 183.
> S. C. 122 U. S. 450.

Attention is also called to the following cases of the same general tenor.

Gibson *vs.* Shufeldt, 122 U. S. 464.
Metcalf *vs.* The Alaska, 130 U. S. 201.
Stuart *vs.* Boulware, 133 U. S. 78.

Lovell *vs.* Cragin, 136 U. S. 150.
Brown *vs.* Trousdale, 138 U. S. 389.
Clay *vs.* Field, 138 U. S. 464.

It seems hardly necessary to discuss the question of multifariousness, in view of the fact that both the lower courts have passed it by, and the holding by this court in Gaines vs. Chew, 2 How. 619; Oliver vs. Pratt, 3 How. 411, and Graves vs. Chew, 152 U. S. 571, that it must be left to the discretion of the court—but it may be mentioned that there is sufficient authority, not only from these cases, but from—

Adams Equity, pp. 309-10.
Dunn *vs.* Cooper, 3 Md. Ch. 76.
Storys Eq. Pleading, § 521 (note *a*), § 286*a* and § 852.
Mills *vs.* Hind, 32 Fed. Rep. 127,

to hold that a bill of this character is not multifarious.

ARGUMENT.

While the assignments of error are six in number, the main argument may be divided into two heads, relating respectively to assignments Nos. 3 and 4, the others being incidentally embraced.

THE LAND PASSED BY THE ASSIGNMENT.

The second ground of the demurrers is founded on the hypothesis that the Maryland land did not pass by the assignment, at least not in such way as would enable

the appellants to reach it. To ascertain the exact status of this land let us consider its history as stated in the bill. Scott owned it in fee simple on October 17, 1888, and conveyed it to Coughlan, who immediately conveyed it back to Scott, his heirs and assigns, to the use of the said Scott, his heirs and assigns upon the following trusts.

> "In trust for the said John B. Scott during his life to retain possession of said parcel of land and premises without impeachment for waste, and receive the rents, issues and profits thereof for his own use and benefit, and from and after his death to hold said parcel of land and premises, unless the same shall be disposed of as hereinafter authorized, for the use and benefit of Mary Elizabeth Scott and Margaret Adelia Scott, daughters of said John B. Scott, their heirs and assigns forever, as tenants in common, and upon this further trust, that said John B. Scott shall have full power and authority to lease or sell said parcel of land, or any part thereof, from time to time, and convey the same in fee simple, absolute or by way of mortgage, deed of trust or otherwise, and upon such terms and for such conditions as said John B. Scott may deem fit, and without obligation on the part of the purchaser to see to the application of the purchase money, or the person lending money to see to the application thereof, and to devise and to dispose of said parcel of land and premises by last will and testament executed according to law."

We insist that these two deeds left the title to the property just where it was before they were made; that their only effect was to muddy the waters—or the land; and that a deed with such remarkable powers to use, mortgage, sell or devise, without responsibility to

anybody, gave Scott a fee simple title as much as though no pretended trust had been added. A deed with similar qualifications was recently held by the highest court of Virginia, in Walke *vs.* Moore, 30 S. E. Rep., 374, to convey a fee simple title. Moreover, the appellee Keane, acting, as alleged, for himself and his colleagues, in his bill in equity in the Maryland court alleged that "Scott was intended to become and was the fee simple owner" (p. 4,) and the court concurred with him.

But it is immaterial whether this be so or not. All property which Scott had, passed by his deed of assignment, and these powers and this control and right to convey it amounted, by their peculiar phraseology, to a property beyond a life estate. The word "property" is so generic as to comprehend all that a man can do with it. Thus in Kuhn *vs.* Common Council, 70 Mich. 137, it was held that a statute forbidding the acceptance of a brewer on a liquor dealer's bond was unconstitutional, as depriving him of the right to pledge his property—it being regarded the same as the property itself; and in Shuman *vs.* Elder, 24 N. Y., 381, it was held that an assignment of all property included the right to bring an action for unliquidated damages for failure to deliver some property.

It is immaterial from another point of view also; conceding appellees' contention that the deeds were not void but only voidable, it by no means follows that none but a judgment creditor could attack them.

Under the ancient rule of the common law an assignee could not attack a fraudulent conveyance made by the debtor, and it may be admitted that hence no creditor claiming only under the deed could do so; but the reason of that rule was that because the debtor him-

self could not attack his own fraud, and because the assignee took only such rights as the debtor had—stepped into his shoes so to speak—neither could he attack it.

Take away the prop and you take away the house, take away the means of living and you take away the life, we know, not only by human experience but also on the authority of Shylock. The law has paraphrased this into a maxim—*Ratio legis cessante cessat lex*—; take away the reason for the rule and the rule falls. There is no reason in the present instance why the assignee or, in the event of his failure, a successor or a creditor in his stead, could not attack these conveyances; Scott was under no inhibition from moving against them; on the contrary, living or dying, he could wipe them out with one stroke of the pen.

Moreover the tendency of modern decisions has been to considerably modify that ancient rule, at least whenever the state has undertaken by statute to regulate the making of assignments and their effect; and this without one word in the statute expressly conferring power to sue to set aside fraudulent conveyances.

The leading case on this point is Pillsbury vs. Kinyon, 33 N. J. Eq. 287, decided by the Court of Errors and Appeals, wherein it is held that:

> "1. An assignee under an assignment for the benefit of the creditors of the assignor, may file a bill to set aside a prior conveyance of lands made by the assignor for the purpose of defrauding his creditors, if the property so conveyed is required for the payment of the claims of creditors."
>
> "2. Assignees under the assignment act and executors and administrators of insolvent estates are the representatives of creditors, andas such,

may, for the benefit of creditors set aside conveyances by the assignor or the decedent in fraud of creditors, to the extent that such property is needed for the payment of debts."

The following are extracts from the opinion:

"Though one who parts with his property for the purpose of defrauding his creditors cannot recover it back, his personal representatives may sue for it for the benefit of his creditors, if his estate be insufficient to pay his debts."

Citing:

Stewart vs. Kearney, 6 Watts, 453.
Buehler vs. Gloninger, 2 Ib. 226.
Bouslough vs. Bouslough, 68 Pa. St., 495.
Everett vs. Read, 3 N. H., 55.
Abbott vs. Tenney, 18 Ib., 109.
Cross vs. Brown, 51 Ib., 486.
Fletcher vs. Holmes, 40 Me., 364.
McLean vs. Weeks, 61 Ib. 277; s. c., 65 Ib. 411.

Also that under acts of 1 Geo. IV, c 119, and 7 Geo. IV, c 57., in Butcher vs Harrison, 4 B. and Ad. 129, assignees were held to be persons aggrieved within the meaning of 13 Eliz., c 5, (the present local law of the District of Columbia).

"In Doe, Grimsby vs Ball, 1 M. and W., 531, the assignee was adjudged capable of recovering lands fraudulently conveyed. Parke, B. said: 'I think that the assignee of an insolvent debtor represents the creditors for all purposes, and if any fraud exists in a transaction to which the insolvent was a party, that the assignee may take advantage of it; a deed which is void as against creditors is void also

as against those who represent creditors.' Alderson, B., also said: 'If a deed be void as against creditors, the assignee who represents creditors may avoid it'.

"In Holmes vs. Penney, 3 K and J, 90, Vice Chancellor Wood said: 'I have no doubt of the right of the assignee in insolvency to sue in this case' referring back to Grimsby vs. Ball.

"In none of these cases was the decision placed on any language in the statute specially empowering the assignee to avoid the fraudulent conveyances of the assignor. In fact neither of those statutes contained any express provision for setting aside conveyances in fraud of creditors, and that fact was unsucessfully, pressed upon the attention of the court by counsel, who argued against the authority of the assignee to execute that power.

"A trustee or assignee in insolvency has been considered as the representative of the creditors of the debtor and as such entitled to avoid, in the interest of creditors, his grants and conveyances made in fraud of creditors."

Citing:

Swift vs. Thompson, 9 Conn. 63.
Palmer vs. Thayer, 28 Ib. 237.
Shipman vs. Etna Ins. Co., 29 Ib., 245.
Moncure vs. Harrison, 15 Pa. St. 385.

The New Jersey Court also cites with approval, Moore vs. Bonnell, 2 Vr., 90, as follows:

"It is difficult to perceive how an assignment voluntarily made by a debtor for the benefit of his creditors, differs in substance from one executed under the compulsion of an insolvent or bankrupt law. There is scarcely a shade of difference between the coercion of circumstances impelling a failing debtor to wind up

> his affairs, and that liquidation brought about by a creditor taking the initiative and proceeding against him."

This opinion is approved by the New Jersey court of chancery in Grant vs. Crowell, 9 Atl. Rep. 201; and in Kalmus vs. Ballin, 28 Atl. Rep. 791, another New Jersey case, carrying out the same doctrine still further, it is held that the assignee having the power, he owes a duty to certain creditors to make such attack, and on failure to perform such duty, *a creditor to whom it is due may file a bill in his own name to avoid such transfer.*

New Jersey is not alone in this view—several other states join the procession.

Thus in Hanes vs. Tiffany, 25 Ohio St., 552, it is said:

> "It is contended that as the mortgage is good against the mortgagor it is also good against the assignee for the benefit of creditors; that the latter stands in no better position than the assignor. The correctness of this position at common law is admitted; but not so under the statute. The statute declares the mortgage void as against the creditors of the mortgagor. The assignee took the property under the assignment and held it for the exclusive benefit of creditors. The mode of providing for creditors by way of assignment in trust for their benefit is recognized and regulated by statute; and we see no good reason why their rights may not be as effectually asserted through the assignee as they could be by judgment and execution in case there had been no assignment."

And in Blandy vs. Benedict, 42 Ohio St., 299.

> "By the assignment the rights of creditors

passed to the assignee as matter of law. The right of creditors to seize the property in the hands of the assignee did not exist, but the assignee was bound in law to administer the trust for their benefit. Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment."

And in Chapin vs. Jenkins, 50 Kan , 385, we find:

"The assignee is the representative of all the creditors, and for their benefit may contest the validity of the fraudulent mortgage;" and on page 394: "The ruling of the lower court that the mortgage being good between the parties it was also good as to the assignee and creditors he represents, and that the assignee could not show fraud in the mortgage is deemed to be erroneous and therefore there must be a reversal."

"The assignee for benefit of creditors may recover property fraudulently conveyed, as he may reach funds in the hands of a fraudulent holder."

Cooper vs. Perdue, 16 N. E. Rep., 141.

"Not only the property omitted from the schedule is transferred to the creditors, but the syndic as their rep esentative, may sue to annul the transfer of any property which the debtor has mad- to their prejudice prior to the cession."

Chaffee vs. Scheen, 34 La. Ann. 686.

It seems clear that the assignee, Browning, had the right to attack these conveyances if it was at all necessary, and that it follows that any creditor might do the same on his failure. Hence that the appellants have

the right by proper proceedings to get at the fee simple, if it is hidden, unless their right to do so is obstructed or destroyed from some other cause.

Whether the Assignment Passed the Title.

This involves two questions; whether it was executed so as to pass title under the District law; and if yea, whether the Maryland statute requiring a bond prevents its going into effect as between the parties to this bill. It is conceded that the execution and acknowledgment was sufficient under the Maryland law.

That the first of these questions must be answered in the affirmative admits of no reasonable doubt. The language of the act of February 24, 1893, is "Such inventory shall not be conclusive as to the amount of the debtor's estate, but such assignment shall vest in the assignee**the title to any other property**belonging to the debtor**at the time of making the assignment and comprehended within the general terms of the same;" another section forbids preferences and provides for the payment of all debts *pro rata*. The declared purpose of the act is thus to forbid partial assignments and to secure an equal distribution of the whole estate.

The validity of such declaratory acts has been repeatedly recognized and the deeds given full effect to convey omitted or misdescribed property.

Falk vs. Liebus, (Colo.) 42 Pac. Rep., 46.
Smith vs. Goodman, (Ill.) 36 N. E. Rep., 621.
Walton vs. Eby, (Kan.) 36 Pac. Rep., 332.
Farwell vs. Gundry, 52 Wis., 268.
Bank of Tennessee vs. Horn, 10 How., 157.
Geilinger vs. Phillippi, 133 U. S., 246.

The last case is almost on all fours with the present one. It came from Louisiana, where the law provided that all property of the debtor should pass by the *cessio bonorum*,—equivalent to our deed of assignment. One Green had made a *cessio* and, in his schedule, not only omitted a certain piece of property but declared in the paper that he did not own it, that it belonged to his wife. Yet both the Louisiana circuit court and this court held that it passed nevertheless, and require certain creditors who had obtained judgment and levied executions to surrender the property to the assignee and take only their distributive share with the rest of the creditors.

The following paragraphs are quoted from the syllabus, which follow almost the exact language used by Chief Justice Fuller in his opinion:

> "By the laws of Louisiana, when a *cessio bonorum* has been accepted by the court and the creditors, and a syndic has been appointed and qualified, all the property and rights of property of the insolvent are vested in his creditors, represented by the syndic as their trustee, and pass to the creditors by the cession, whether included in his schedule or not.
>
> "This rule relates to possession and disposition, and the surrender of the insolvent does not devest him of the title to the property surrendered, though it strips him of the power to control alienate or dispose of the same, during the administration of his estate.
>
> "If property be omitted by mistake or with fraudulent intention, it is the duty of the syndic to have the schedule amended so as to include it, *and it is the duty of the creditors to bring it to his attention that he may do so.*
>
> "Evidence offered that the insolvent did not intend to include such property, because advised

> by counsel that it was not liable for his debts, was properly excluded, as his intention could not control the operation of the law or defeat the rights of his creditors."

A similar ruling was made in Bank of Tennessee vs. Horn, *supra*, where certain property was imperfectly described and creditors seized it; and Chief Justice Taney, in delivering the opinion, said it was immaterial whether the description was sufficient to identify the property, that it passed anyhow by the cession, and the syndic's title was superior to that of a purchaser at the creditors' sale.

Of the same general tenor also are Brashear vs. West, 7 Peters, 614, and Burrill on Assignments, § 99.

Were there no Maryland statute relating to assignments, it is clear that the deed passed all of Scott's property to the assignee. But it is contended that although the deed was in proper form, and although the creditors knew of its execution, and although it was duly recorded before all but two of the attachments had been levied, yet it was not good against any creditor who saw fit to disregard it, because Article 16, § 205, of the Maryland code declares that no title shall pass to the trustee until a certain bond is filed—which Browning never caused to be done; and a number of Maryland decisions are cited, upholding this provision. It will be noticed, however, that none of these are cases in which an assignment executed out of the state, at the debtor's domicile, has been sought to be avoided by a creditor also of the same domicile.

In Williams vs. Kemper, 43 Pac. Rep. 1148, decided in Oklahoma in 1896, an opinion was delivered exhaustively reviewing the decisions on the effect of foreign assignments on domestic real estate, and it was held that—

"A deed of assignment made and executed in the Indian Territory according to the laws of that territory, and conveying real estate in Oklahoma is sufficient as a deed of conveyance in Oklahoma if it conforms to all the statutory requirements of Oklahoma as to its recitals, execution and acknowledgment, and has been duly filed for record in the office of the register of deeds in the county where the land is situated. The assignment laws of Oklahoma, only having been intended to embrace assignments made within the territory, have no application to assignments made in the Indian Territory, and an assignee or trustee under an assignment made there is not required to comply with Oklahoma statutes as to filing schedule giving bond, etc., in Oklahoma. (p. 1151, from opinion).

"The referee and the trial court held that the deed of assignment was not operative here, because the assignee had failed to comply with the laws of Oklahoma, in giving bond, filing schedule, etc. He was under no obligation to comply with our assignment laws. If the deed of assignment was sufficient under our laws to convey property, and was recorded as deeds are required to be recorded, the assignee took the title of the assignors.

The court cites Barnett vs. Kinney, 147 U. S. 476, and quotes from opinion therein.

"While the statute of Idaho prescribed pro rata distribution without preference in assignments under the statute, it did not otherwise deal with the dispositions of property by a debtor or prohibit preferences between nonresident debtors and creditors through an assignment made valid by the laws of the debtor's domicile. No just rule required the courts of Idaho at the instance of a citizen of another state to adjudge a transfer valid at common law, and by the law

> of the place where it was made, to be invalid because preferring creditors elsewhere, and therefore in contravention of the laws of Idaho, and the public policy therein indicated in respect of its own citizens proceeding thereunder."

The court also cites in support of its ruling as to real estate—drawing distinction between voluntary and involuntary assignments.

> Roger vs. Allen, 3 Ohio, 489.
> Sodwell vs. Jewett, 9 Ohio, 181.
> Lamb vs. Fries, 2 Penn., 83.
> Palmer vs. Mason, 42 Mich., 152.
> Pemberton vs. Klein, 43 N. J. Eq., 98.
> Bentley vs. Whittemore, 19 N. J. Eq., 462.
> Merchants Bank vs. Bank U. S., 2 La. Ann., 660.
> Eddy vs. Winchester, 60 N. H., 63.
> Green vs. Cross, 12 Neb. 117.
> Chaffee vs. Bank 71 Me., 514.
> Gardner vs. Bank, 95 Ill., 298.
> Heyer vs. Alexander, 108 Ill. 385.

> "While a receiver appointed in Connecticut had no rights in Maryland as to citizens of Maryland or third states the Connecticut proceeding was binding on all citizens of Connecticut."
>
> Linvell vs. Hadden, 88 Md. 597.

In this case the following authority is cited with approval:

> "A receiver of one state will be recognized and permitted by another to do all that is necessary to take and possess the property there located, provided that to do so will not violate any law or policy of the latter, or embarrass or do injustice to any of its citizens, or to those of a

> third state who have come there to enforce the payment of their claims against the debtor."
>
> Beach on Receivers, § 268.

And even Maryland courts relax the statute; as for instance in Moore vs. Land Title and Trust Co. (Md)., 33 Atl., 641, it was held—

> "It not being necessary to record an assignment by a foreign corporation for the benefit of creditors of Maryland in order that personalty in Maryland may pass thereunder, the fact that it was so recorded did not render it necessary for the trustee to file bond in the latter state."

The validity of an assignment is to be governed by the law of the domicile, at least as to creditors residing there, regardless of the *situs* of the property.

> Schroder vs. Tompkins, 58 Fed. Rep., 672.
> Farwell vs. Gundry, *supra*.
> Woodward vs. Brooks, 3 L. R. A., 702.

Leading article on "Assignments beyond State" 42 Cen. L. J. 71.

> "An assignment for the benefit of creditors made in another state and executed in conformity with the laws of that state will pass the title to the property of the assignor in this state."
>
> Smith's App., 117 Pa. St., 30.
> Bacon vs. Horne, 123 Ib., 452.

The only exception is in favor of a domestic creditor having no actual or constructive notice of the assignment.

> "Where a transfer of property is valid by the

lex loci, whether it be effected by the act of the debtor or by operation of law, no just rule of comity requires the courts of the state where the property happens to be located, to adjudge such transfer to be invalid, at the instance of citizens of other states, simply on the ground that it is incompatible with its laws. For example: A transfer of property located here, made by a citizen of New York which, though inconsistent in substantial respects with the provisions of our law, yet is valid by the law of New York, will be enforced here against everybody but the citizens of this state."

Receiver vs. First Nat. Bk. 34 N. J. Eq. 454.

Bentley vs. Whittemore, 19 Ib. 462.

"Where, at the time of the assignment, both the creditor and assignor are residents of the foreign state where it is made, the creditor may not come into this state and seize property of the assignee in a suit in foreign attachment."

Bacon vs. Horne, *supra*.

Bagby vs. R. R. Co., 86 Pa. St., 291.

In Juilliard & Co., vs. May, 130 Ill., 87, the court held that:

"A voluntary assignment made in another state by a non resident debtor, executed in conformity with our laws in respect to the conveyance of property, but which is inconsistent in substantial respects with our statute relating to assignments, will not be enforced here to the detriment of our citizens; but for all other purposes, if the assignment is valid by the *lex loci*, it will be carried fully into effect.

"Provision of statute prohibiting preferences applies only to assignments made in this state

> and not to those made in other states; and a non-resident may execute a voluntary assignment with or without preferences, as he may see fit, as long as creditors in this state are not injuriously affected thereby."

And in Long vs. Girdwood, 150 Pa. St., 413:

> "A resident of a foreign state cannot, by a writ of foreign attachment in this state, obtain a preference over an assignment or sequestration for the benefit of creditors of the estate of a non-resident. The rule rests on comity between states and the only exception is in favor of our own citizens.
>
> "Failure to record the assignment in this state will not give priority to such foreign attachment, as the act was passed for the protection of domestic creditors alone."

And in Palmer vs. Mason, 42 Mich. 146:

> "The rule that a voluntary assignment by a foreign insolvent debtor will be postponed to the rights of an attaching home creditor does not apply to real property.
>
> "An assignment for the benefit of creditors is not avoided by a subsequent attachment levied before the assignment could be put on record."

It will also be observed that the Maryland statute only says that no *title* shall pass to the trustee until the bond is executed, and that under the ruling of this court, *ante*, in Geilinger vs. Philippi, it is not necessary, to protect the property against seizure, that the title *shall* pass, but only the possession and disposition; that the property cannot be taken by the creditor, where the right to control and administer has passed to the assignee by a trust created, although the *title* remains in the assignor.

This decision is in harmony with the rulings of many states. "The moment an assignment is filed for record in the proper office, the beneficial interest of the creditors is completely vested, whether the assignee accepts the trust or not."

Marks' Appeal, 85 Pa. St., 231.
Weinman's Estate, 164 Ib., 435.

In Frank vs. Heiner, (N. C.) 23 S. E. Rep., 42, it is said:

"While it is necessary that there should be a legal execution of an assignment to a trustee for the benefit of other parties, it must be kept in mind that these other parties, the *cestuis que trustent*, are the real parties in interest; that they are the parties for whose benefit the deed was made, that they are the equitable owners, and courts of equity will not allow them to be deprived of the benefit of their estate because the trustee refused to act. Burrill Assign., (6th Ed.) p. 312, § 240, 241. It is a principle of equity that a trust shall not fail for the want of a trustee; if necessary a court of equity will appoint a trustee to execute the trust. Adams Eq., (7th Ed.) 36. Burrill Ass. *supra*."

And in Sabin vs. Leibenbaum (Ore), 38 Pac. Rep., 434.

"An assignment cannot be set aside and declared void for the failure of an assignee to qualify. In such case the court is authorized, on the application of any person interested, to appoint some person to execute the trust."

"An assignment recorded in the wrong book is valid as to creditors, though it might be avoided by a *bona fide* purchaser."

Watkins vs. Wilhoit, (Cal). 38 Pac. Rep., 53.

"Though Gen. St. Ch. 24, § 10, provides that no deed of trust or mortgage conveying a legal or equitable title shall be valid against creditors until acknowledged and lodged for record, a general assignment for benefit of creditors duly executed and delivered to the assignee vests in him an equitable title though not yet lodged for record; and a creditor then attaching acquired only an equitable right, to which an equity prior in point of time is superior."

First Nat. Bk. vs. Keefer, (Ky). 23 S. W. Rep., 675.

Mich. Pub. Laws, 1879, p. 318, provides that:—

"No such assignment shall be effectual to convey the property of the assignor to the assignee, until such bond shall be executed, filed with and approved by said clerk."

In Fuller vs. Hasbrouck, 46 Mich., 78. *Held*: Failure of assignee to give bond did not render assignment void for all purposes. Creditors were not authorized to make levies; there was a trust created by the assignment; the failure to file such bond created the contingency which entitled the court to interfere with its receiver, on interference of creditors, and administer the trust in equity.

Seibert vs. Milligan, 10 N. E. Rep. Where all assignor's property passes under a deed by virtue of a statutory assignment no subsequent judgment creditor can obtain a lien.

"An assignment for creditors made by a nonresident will pass title to the assignor's personality in Texas, though it is not registered in the state."

Carter Battle Grocer Co. vs. Jackson, 45 S. W. Rep., 615.

In Wright vs. Youtsey, 5 Ohio N. P., 56, the Hamilton County court of common pleas held, in an elaborate opinion, that a deed of assignment executed in Kentucky, operated to convey real estate in Ohio from date of delivery, as against an attaching creditor who levied before it was recorded, drawing a distinction between voluntary and involuntary assignments in favor of the former.

This same case afterwards came before the supreme court of Ohio in Wright vs. Franklin Bank, 51 N. E. Rep., 876, and the court said:

> "The deed of assignment was executed and delivered in the state of Kentucky, where all the parties resided, and conveyed property (real estate) in Hamilton County in this state (Ohio). Such a deed could not be filed with the probate judge and take effect from the time of its delivery to him, as required by Sec. 6333 Rev. St. The deed in this case was in due form and took effect from the time of its delivery to the assignee." Citing Johnson vs. Sharp, 31 Ohio St., 611.

Appellees Estopped to Deny Trust Title.

As we have seen, the bill alleges that, independent of estoppel by reason of domicil, there was active acceptance of the assignment by all the appellees, and they are thereby estopped to deny the sufficiency of the conveyance as to any of the property. Browning was a party to the deed, signed it and accepted the trust. Surely he cannot be heard to say that it became ineffectual and that he had the right to grab for his own use any of the property, because of his own failure to per-

form one of his duties, the giving of the bond. Neither can the firm of Browning & Middleton, of which he was a member; neither can the Central National Bank of which he was director and vice-president, for, as has recently been held by the court of appeals, D. C. in Post Steamboat Co. vs. Loughran, 26 Wash. L. R., 405, a bank is bound by the knowledge and conduct of its officers in matters pertaining to its pecuniary claims.

This leaves only Keane and Whitford's claims to be considered, as independent of any acts of Browning; but the bill alleges as to them, as well as the firm and the bank, that they elected to accept the provisions of the deed, attended creditors' meetings called by the assignee, voted as to the disposition of the estate, and accepted dividends paid by the assignee.

This is not denied by any of them except Keane, who in an affidavit heard on the injunction, says he only attended one creditors' meeting. But it is shown by the affidavits of two witnesses (Record pp. 10 and 11), that he not only attended two meetings, but accepted a fiduciary position for the creditors, membership on a committee to confer with the assignee to consider a time for the sale of the properties, (on which committee two of the appellants also served), united in a report recommending the removal of the assignee and the appointment of a receiver, and voted in creditors' meeting to adopt this report.

In Groves vs. Rice, 148 N. Y., 227, where a creditor, who had accepted a benefit under the assignment, attempted to gain an advantage over other creditors, the court said:

> "By such conduct, I think, the plaintiff estopped himself from thereafter setting up the invalidity of the assignment. Having recog-

> nized the assignment for the purpose of gaining some advantage, he could not in conscience, turn around and assert its invalidity. It is of no consequence, and I do not think we need consider, whether he could or did receive, in fact, the benefi' supposed. It might have been altogether illusory, and yet there was sufficient in his attempt at using the assignee and the funds of the estate for his benefit to estop him in equity from complaining that the assignment was worthless at law."

The effect of this election to take under the assignment is well illustrated by the rule affirmed by this court in Cole vs. Cunningham, *infra*, that state insolvent laws bind both foreign and domestic creditors,

> "if they make themselves parties to proceedings under these insolvent laws by accepting dividends, becoming petitioning creditors, or in some way appearing and assenting to the jurisdiction." Citing 1 Wall, 223 and 4 Wall, 409.

In the recent case of Kendall vs. McClure Coke Co., 182 Pa. St., 1, it was held that the filing of exceptions to an assignee's account was an affirmance of the assignment and an election to take under it, and the creditor was thereby estopped to proceed in other states to attach land, because the deed was not executed according to the laws of those states; and an injunction was granted restraining the creditor from prosecuting his attachment suits, etc., similar to the injunction granted here.

It is a well settled rule that if a creditor does any act which affirms the assignment he cannot afterward dispute the validity of any of its parts. Indeed I do not understand that this proposition is disputed, but the

counsel for appellees advance the remarkable and very attenuated counter proposition, that the estoppel, if there was any, was only as to the life estate, it being all the interest mentioned in the deed. This kind of estoppel would be like the Irishman's reciprocity, all on one side. It only estops them from denying that which they couldn't deny anyhow.

As I understand it estoppel, like "business," defines itself—an estoppel is an estoppel.

Where a creditor, especially one named in the deed as such, does any act to affirm it, he becomes just as much a party to the deed as though he had signed his name to it, and is bound by all its provisions. It has already been demonstrated that the local statute made the deed effective as to all interest that Scott had; the estoppel then goes not only to the letter of the deed but to the construction which the law of the domicile gives it.

Another very narrow distinction sought to be drawn is between voluntary assignments and insolvent acts. As appears from several of the cases *ante*, the courts do not recognize any such distinction. The estoppel is by matter *in pais*, and not by matter of record. There is, unfortunately, in the District of Columbia no statute requiring an assignee to settle his account with the courts; but it does not follow that creditors are at the mercy of other creditors who may seek to take a part of the property in dividends with one hand and clutch the rest with the other. No sound reason can be given why acceptance of a deed shall not be as binding as the recognition of a judicial proceeding. Indeed, as held in Williams vs. Kemper, *supra*, the voluntary conveyance is the more potent.

"The jurisdiction of the court of chancery to

restrain persons within its territorial limits and under its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the institution or prosecution of an action in a foreign court, is well settled. This is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial rights abroad, but on the circumstance of the person of the party on whom the order is made being within the power of the court. The rule has been often applied by the courts of the domicile against the attempts of its citizens to defeat the operation of its laws to the injury of others. * * * It may grant an injunction to prevent an evasion of the insolvency laws of the state. The exercise of this jurisdiction is not forbidden by the provisions of the constitution that full faith and credit shall be given judicial proceedings of other states." * * *

"The determination of what is a proper case for the interposition of equity would seem to be reposed in the court whose authority is invoked. But it must appear that such proceedings will be vexatious or oppressive or are instituted to obtain some unjust or inequitable advantage."

Beach's Mod. Eq. Jur. § 649.

"A state court of equity may enjoin a citizen of that state from availing himself of attachment proceedings in another state, against a debtor against whom insolvency proceedings have been instituted in the former state, and for whom an assignee has been appointed."

Dehon vs. Foster, 4 Allen, 545; 7 Allen, 57.

"If a domestic creditor goes out of the state to avoid a valid chattel mortgage on railroad rolling stock, which is not effective in the state to which he goes, and institutes attachment

proceedings without making the mortgagee a party, he may be enjoined from continuing them."

Vail vs. Knapp, 49 Barb , 299.

"A voluntary cession of property by a Louisiana debtor including real estate in Mississippi which is perfected by a judge's order before attachment proceedings by a citizen of Louisiana are begun in Mississippi, will be valid in Louisiana to defeat such attachment; and the attaching creditor being within the jurisdiction of the court may be compelled to deliver the proceeds obtained by him from his attachment to the Louisiana syndic."

Hayden vs. Yale, 45 La. Ann. 362.

The authorities show that equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice or unconscientious advantages; and most especially where there is an attempt to evade or defeat the laws of the state where both parties to the suit reside.

Miller vs. Gittings, (Md.) 37 Atl. Rep. 375.

In Kendall vs. McClure Coke Co., *ante*, reported in 27 Atl. Rep., 823, and 182 Pa. St., 1, as we have seen, the court granted an injunction to restrain a Pennsylvania corporation from prosecuting attachments against lands in Georgia and Florida, which were embraced in the assignment in Pennsylvania, but which it was contended was void in those states, because of certain omissions from the deed, of certain features essential to make it a valid assignment there. This case is so nearly identical with the present one that the reasoning of the court is here quoted somewhat at length:

"We think it clear that if defendant were attempting to question the validity of the assignment under the laws of this state, it would be held to have estopped itself from denying it by its unequivocal acts affirming it. Why, if the same acts estopped the creditor here, should he not be estopped from denying it elsewhere? If equity would close his mouth here, his mere removal to another jurisdiction does not open it to effect the same result. It is just as unconscionable to assert in Georgia the invalidity of the assignment as to assert it in Pennsylvania. But it is argued by appellee, if the assignment in Pennsylvania cannot pass lands in other states, where the conveyance does not conform to the laws of the *situs*, then by the assignment the property is not subject to the claims of the general creditors, and the defendant, in levying its attachment upon it, impairs no right of any creditor under the assignment; and, further, to restrain the attaching creditor is to in effect decide a question of foreign law, which the weight of authority holds should be decided by the foreign courts.

"As before noticed, without inquiry as to whether, under the laws of Florida and Georgia, the title to the lands in those states passed to the assignee, for the purposes of this case we assume it did not; but this creditor by the most significant acts and assertions of record, averred it did pass, and then took all the benefit possible from affirming the validity of the assignment. Whether it passed or not, it cannot now say it did not. *What acts on the part of a corporation creditor of this state, under an assignment here, shall in equity constitute an estoppel is a question for the courts of this state*; for the creditor voluntarily made itself a party to the assignment—voluntarily adopted the assignee as its trustee in the management and conversion of the very assigned property it now seeks to appropriate."

This case is criticised by the court of appeals and held in conflict with Moore vs. Church, 70 Iowa, and the latter preferred; but in King vs. Glass, 73 Iowa, 205, it was held that objection only went to cases where deeds were in conflict with the policy of the law, as distinguished from details of completion.

In Cole vs. Cunningham, 133 U. S., 107 and Phelps vs. McDonald, 99 U. S., 298, the Supreme Court approves the general principle above stated, and it is not denied by appellees' counsel here, but they urge that it only applies to pending proceedings and not to the enjoining of the execution of a foreign judgment rendered in an attachment proceeding; and the full faith and credit clause of the constitution is invoked.

Congress says that it only means that they shall give the same faith and credit that the state where rendered would give. It was not the intention of the framers and adopters of that vererable charter to require a state to give higher credit to a foreign than to a domestic judgment. On this point see Hayden vs. Yale, *supra*.

That the court of chancery has power to stay proceedings on any judgment at law, was settled long ago.

In 3 Blackstone's Commentaries, 437, the learned author, treating "Of Proceedings in Courts of Equity," says:

> "The courts of equity have acquired a jurisdiction over almost all matters of fraud; all matters in the private knowledge of the party which, though concealed, are binding in conscience; and all judgments at law obtained through such fraud or concealment. And this not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained

> by suppressing the truth, and which, had the same facts appeared on the trial as are now discovered he would never have attained at all."

And in Cole vs. Cunningham, *supra*, this court said:

> "Judgments in another state are not conclusive. They enjoy not the right of priority or privilege or lien which they have in the state where pronounced, but that only which the *lex fori* gives to them by its own laws in the character of foreign judgments. The jurisdiction of the court to pronounce them may be inquired into."

It is contrary to a natural sense of justice to hold that any person is bound by a judgment to which he is not a party. That foreign judgments *in rem* are not conclusive on nonparties is the settled rule both in this country and England.

Imri vs. Castrique, 8 C. B. N. S., 405, was as to the effect of a proceeding to enforce a maritime lien, arising by operation of law, on a ship. It was conceded that if it had been *inter partes* the judgment would not have been binding against persons not parties.

On p. 411 the court says:

> "It is no doubt true that a judgment of this sort which simply decrees the sale of a particular chattel, to satisfy a money demand, hardly falls within the strict definition of a judgment *in rem*, inasmuch as it does not determine the status of the chattel with reference to property."

But it is sustainable on the ground that there is a hypothecation of the vessel.

In Simpson vs. Fogo, 1 H. & M., Eng. Ch., 195,

a mortgaged British ship was attached in Louisiana, the mortgagee intervened, his title was refused and ship sold; when it reached England the mortgagee filed bill to establish his lien—*held* that the Louisiana decree was not binding, because in conflict with the law of England.

The court says (p. 221): "The court of Louisiana sold the ship under a process analogous to our *fifa*, that is to say, they sold all the right and interest of the apparent owners or mortgagors. Of course such sale would simply pass the equity of redemption." (p. 222): The attachment was not a proceeding *in rem*; (p. 278): Such must be to enforce a privilege or lien; property passes only when sold in that manner."

And in Covey vs. Cutler, 56 N. W. Rep., 255, an assignee in Minnesota sued a Minnesota creditor for the conversion of certain property, sold in Wisconsin under judgment and execution against the insolvent. *Held*, under *In Re* Paige & S. Lumber Co., 31 Minn., 136, that a voluntary conveyance good by the laws where made, passes the title wherever the property may be situated, and a verdict for plaintiff was affirmed.

> "It is not too late to intervene after judgment in the attachment proceedings when the proceeds of sale are in the court's hands awaiting distribution."
>
> Hockaday vs. Drye, 54 Pac. Rep., 475.

It may be doubted whether there is any such thing in America as a proceeding *in rem* unless it be in admiralty or under the revenue laws.

In support of the proposition that a judgment of condemnation in attachment is not a judgment *in rem*, binding on persons not parties to the attachment pro-

ceedings, the counsel for appellants call attention to the following authorities:

Mankin vs. Chandler, 2 Brock, (U. S.) 125.

Opinion by Chief Justice Marshall, sitting in circuit court.

Magee vs. Beirne, 39 Pa. St., 50.
Woodruff vs. Taylor, 20 Vt., 65.

Where the court says:

> "They are not based on any allegation that the right of property is to be determined between any other persons than the parties to the suit; no notice is sought to be given to any other persons, and the judgment being only as to the *status* of the property as between the parties of record it is, as to all other persons, a mere nullity."

Samuel vs. Agnew, 80 Ill., 553.
Freeman on Judgments, § 607 *a*.
Bigelow on Estoppels, pp. 49-50, Ch. 2, § 1.
Wells on Res. Adjudicata, §§ 556 and 578.

> "Attachment is only a proceeding *quasi in rem*, and, therefore a judgment does not conclusively bind a stranger to the proceedings whose rights of property have been violated by the seizure under the writ."

The counsel for appellees rely strongly on Green vs. Van Buskirk, 7 Wall., 139, as conclusive that a foreign judgment condemning attached property cannot be attacked; but the distinctions between that case and the present one are obvious. That was an action at law for the conversion, not a bill in equity to prevent the conversion. That was an action by a mortgagee,

and not by creditors claiming equally with the suing creditors, under a trust for their joint benefit. The decision in that case was also based on want of notice of the mortgage to the creditor attaching, and actual notice of the attachment proceeding given to the mortgagee, and his failure to appear and contest. Here it is admitted that appellees knew of and accepted the trust deed before they levied the attachment, and it is not pretended that the appellants had any notice of the attachment proceedings until after judgment.

In that case we find on page 141, in the statement of the case by the reporter:

> "After the levy of the attachment Green received notice of the mortgage and the claim under it, and Van Buskirk and the others, mortgagees, were informed of the attachment; but they did not make themselves parties to it and contest the right of Green to levy on the safes, which they were authorized by the laws of Illinois to do."

And on page 147, in the opinion of the court:

> "If Green at the date of the levy of his attachment did not know of this mortgage, and subsequently perfected his attachment by judgment, execution and sale, the attachment held the property, although at the date of the levy of the execution he did know of it."

And an examination of the case shows that this court did not refuse to review the Illinois decission, but did so and came to the conclusion that it was right under the Illinois law, and that that law governed because of the peculiar facts in that particular case, mainly want of actual or constructive notice of the mortgage.

There is not the conflict between courts or countries, between the State of Maryland and the District of Columbia, that the counsel for appellees would have your honors imagine. Had the Maryland court been advised of the facts set forth in the bill, it would never have rendered the judgments complained of. If the appellants saw fit to intervene in the attachment suits, even after judgment, it would not be too late (Hockaday vs. Drye, *supra*). But they are not compelled to go there; they can intervene or interfere here, where the parties all reside (Kendall vs. McClure Coke Co., *supra*), and the questions at issue are properly determinable here and according to our own laws. And if the deed of trust here seems in any respect defective to pass the Maryland property, by the Maryland law, it can be required to be corrected.

See Towne vs. Campbell, 35 Minn., 233, a case of supplementary proceedings by a creditor.

> "To reach, for the purpose of satisfying a creditor's demand, real estate lying out of the jurisdiction, the court of chancery could appoint a receiver, and compel the debtor to execute to him such conveyance as would be effectual to pass the real estate, according to the law of the state or country where it is situated."

Citing:

Mitchell vs. Bunch, 2 Paige, 606 (22 Am. Dec. 669).

Bailey vs. Ryder, 10 N. Y., 363.

THE DISTRICT COURT CAN ENJOIN.

One other question raised by appellees remains to be considered. It is argued that no matter what may

be the equities, or the power of courts of the domicil over foreign judicial proceedings, yet because of Sec. 720, U. S. Rev. Stat., which forbids "any court of the United States to stay proceedings in any court of any state, except in bankruptcy proceedings," no injunction can be granted. This section was enacted in 1873, and was a revision of an early statute. It was evidently passed, not as counsel for appellees state it, "to prevent unseemly conflicts between courts of different jurisdictions," but to prevent, as suggested in Whitney vs. Wilder, which they cite, unseemly conflicts between the state and the federal courts located within the same territory. It has already been quite liberally construed beyond its letter. Thus it has been held that it does not apply where the U. S. courts have taken jurisdiction first, nor forbid an injunction against the institution of suits. See 10 Blatchford (Fisk vs. Railway Co.), and 54 Fed Rep., 547. At all events, the supreme court of the District is not, in a proceeding like this, acting as a court of the United States within the meaning of that section. The functions of this court are dual. In matters of civil controversies, especially between its own citizens, it has the functions of a state court. The District court of appeals did not in U. S. vs. Mills, cited by appellees, hold, as they assume, that this section applied to the District supreme court. An examination of that opinion shows that the only approximate question involved was whether the police court was a court of the United States within the meaning of a certain section, and it was held that it was not, because of local acts indicating the contrary. Some casual expressions are found in the opinion to the effect that the words "court of the United States" comprehend the district supreme

court, but the court had not before it the proposition, and, therefore, could not and did not determine that this was true in all cases where the words are used. If appellees' contention be correct, we have the anomalous condition of affairs that all states have the right to enjoin each other's courts, while the District of Columbia, a sovereignty for such purposes, is powerless to prevent its own citizens from robbing each other by wrongful and oppressive litigation, if they only step outside of the district line to do so.

Then, whatever may have been the law in 1873, a local statute since passed has unquestionably conferred the power of injunction. At the same time that the U. S. Revised Statutes became the law there was passed the Revised Statutes of the District, and under that revision the only civil jurisdiction given the supreme court was in sections 760 and 762 giving the same jurisdiction as the circuit and district courts; Sec. 763 gave the court jurisdiction only in criminal and penal cases arising in the district. Congress soon found that the restriction on the civil jurisdiction hampered the court in the matter of civil cases arising between residents, and on February 27, 1877, amended sec. 763 by prefixing these words:

> "Said court shall have cognizance of all cases in law and equity between parties both or either of which shall be resident or be found within said district."
>
> 19 Stat. L., 240, Supp. 279, and Abert's Compiled Statutes, p. 296, § 22.

The granting of "cognizance" of all cases in equity necessarily conferred the power to issue the writ of injunction to stay proceedings in a state court, where it would be proper in any similar case as between dif-

ferent sovereignties. The lower court while not deciding this question argues and intimates strongly and rightly that an injunction is not forbidden in this case by this statute.

The question of the right to enjoin proceedings is, however, immaterial under the present record. The prayer of the bill is in the alternative.

> "If this cannot be done that the attaching creditors be directed to bring into court any moneys realized from said land, etc."

The restraining order was modified so as to permit the sale of the land to go on, and, while it would be travelling out of the record to say it has been made, the presumption arises that it has.

APPELLEES NOT GUILTY OF LACHES.

To be guilty of laches the party must have some notice of what is going on, and be apprised that his intervention will be available. The first judgment was rendered Nov. 11, 1896, and immediately the bill in equity to determine Scott's interest was filed, and was pending eighteen months before a final decision was reached. It is not pretended that the appellees had any notice or knowledge of what was going on, and none will be presumed where the proceeding is in a foreign state. Within a month after the property was held subject the appellees intervened with this suit. As we have noted, a claimant has a right to intervene any time after judgment before the attached property or its proceeds shall have been turned over to the plaintiff.

Hockaday vs. Drye, *ante*.

The citation from High on Injunctions, quoted in appellees' brief, to the effect that it must appear affirmatively that the judgment was not caused by any inattention or negligence on the complainant's part, before he can obtain an injunction, on its face shows that it relates only to a judgment at law, directly against him, in a suit to which he was a party. It has been held that a bill in equity which shows laches on its face is bad on demurrer, but no decision can be found that in a case like this laches will be inferred.

There is a show of reason in the contention that appellees' litigation ought not wholly to inure to the benefit of the appellants, but it goes too far in taking the position that they should derive no benefit from it whatever.

Precisely the same question was urged in Geilinger vs. Philippi, 133 U. S., *ante*, that it would be unjust to permit the general creditors to appropriate property which a particular creditor had discovered, fought for and recovered for himself; and both the lower and the upper court held that an order directing the reimbursement of his costs in subjecting it, gave him all the relief he was entitled to. No objection can be offered to the court below on final hearing making a similar order, and it will doubtless do so.

CONCLUSION.

While the questions involved are numerous and interesting, I feel confident that the court will solve them in favor of the appellants, reverse the decree and allow the cause to proceed to a hearing on its merits, if the appellees should see fit to answer.

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